IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

COMMERCIAL CREDIT COMPANY (a corporation), Appellant, *v.* THE UNITED STATES OF AMERICA, Appellee.	No. 258

BRIEF FOR APPELLANT.

Decision Below.

The decision of the United States Circuit Court of Appeals in this case is reported—*Commercial Credit Company* v. *United States*, 17 Fed. (2d) 902.

The decision of the United States District Court is not reported, and may be found in the record (Pages 37-39).

Question at Issue.

Practically the only question to be determined in this case is the one which was expressly left open by this court in *United States* v. *One Ford Coupe*, 272 U. S. 321, and *Port Gardner Investment Company* v. *United States*, 272

U. S. 564, and which is referred to by Mr. Justice Butler in his concurring opinion in the *Port Gardner Investment Company* case as follows:

> "The substance of that question is whether the prohibition officer, discovering one in the act of transportation, may disregard the plain and direct commands of Section 26 to proceed against the vehicle as there directed."

Statutes Involved.

The two principal statutes involved in this cause are Section 26 of the National Prohibition Act, and Section 3450 of the Revised Statutes, which read as follows:

> "National Prohibition Act, Title II.
>
> *Chap. 85, Act Oct. 28, 1919; 41 Stat., L. 305, 315.*
>
> Sec. 26. When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with suffi-

cient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Revised Statutes.

Sec. 3450 of the Revised Statutes. (Removing and concealing articles with intent to defraud United States of tax—forfeiture and penalty.) Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses

of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct."

Statement.

On November 23, 1925, an information was filed and libel issued out of the District Court of the United States for the Western District of Washington, Northern District, for and on behalf of the United States against one Ford Coupe, Motor No. 10587243, and against all persons lawfully intervening for their interest therein, and praying for the forfeiture of said Ford Coupe because it was used in the removal, deposit and concealment of intoxicating liquor with the intent to defraud the United States of a tax thereon (R. 3).

On December 16, 1925, appellant filed in the said District Court claim for the said Ford Coupe (R. 6) and made answer to the libel (R. 13), which answer was amended (R. 16-19), and on January 4, 1926, the Ford Coupe was released into the custody of appellant upon the giving of a bond for $500 (R. 2); trial by jury was waived and the cause was tried on its merits on March 29, 1926, before the Honorable George N. Bourquin, District Judge, and final decree was entered in the said District Court on May 5, 1926, in which it was ordered, adjudged and decreed that the motion of appellant to dismiss the libel be denied, and that the said Ford Coupe, its tools and accessories, be condemned and forfeited to the United States and forthwith

sold (R. 46). The opinion of the District Court is found in the record (pp. 37-39); the decree on page 46.

Notice of appeal to the Circuit Court for the Ninth Circuit was filed on May 13, 1926, and among its assignment of errors appellant set forth as follows (R. 50-51):

> "(8) The Court erred in not dismissing libellant's case for the reason that the automobile involved herein was subject to forfeiture only under Section 26 of the National Prohibition Act inasmuch as the record shows that W. G. Campbell, the man driving the car at the time of its seizure had been charged and convicted under the terms of the National Prohibition Act and that by virtue thereof the automobile herein was convicted at one and the same time.
>
> "(10) The Court erred in entering a decree of forfeiture herein for the reason that there is no evidence whatsoever in the record to show that the automobile was being used for the removal, concealment, or deposit of intoxicating liquor with an intent to defraud the United States of a tax due thereon."

The said appeal was heard by the Circuit Court of Appeals for the Ninth Circuit as case No. 4916, and the said court affirmed the judgment of the District Court (R. 78).

An opinion was rendered with reference to said decree (R. 71) and a stay of mandate was granted pending the filing of a petition for writ of certiorari in this court, which was filed May 19, 1927, and was granted by this court on October 10, 1927.

Appellant is a Delaware corporation with its principal office at Baltimore, Maryland and branch offices and sub-

sidiary companies throughout the United States, with a branch office at Seattle, Washington, in which state it was duly qualified to conduct business. Appellant is engaged among other things in the business of financing the sale of automobiles on the deferred payment plan by purchasing or otherwise acquiring from automobile dealers conditional sale contracts or other instalment obligations given to automobile dealers by the retail purchasers of automobiles. Appellant is a substantial company with capital and surplus of over $30,000,000 and total resources of about $100,000,000. It numbers among its directors and officials men of recognized business and financial integrity. Its operations and those of companies similarly situated form a necessary link between banks and the automobile manufacturing industry, now the largest industry in the United States and generally believed the largest in the world. Its business has been referred to as "an intensive part of our commercial banking system". See Federal Reserve Bulletin, January, 1923, on "Finance Companies", and World's Work Magazine, October, 1925, page 575. Over 4,000,000 automobiles are sold annually within the United States, and it is estimated that at least 75% of these are sold upon the deferred payment plan, under which the automobile dealers reserve title to or lien upon the automobiles by conditional sale contracts or other instruments. The method of operation is that the finance companies, such as the appellant, purchase or discount the conditional sale contracts from or for the automobile dealers, and then in turn rediscount with banks or hypothecate with trust companies such conditional sale contracts, issuing against them collateral trust notes, which in turn are bought by banks throughout the United States. One thousand such active finance companies in one

year, it has been estimated, employed in capital and borrowings in this industry of financing the sale of automobiles, over two billion dollars ($2,000,000,000).

It is impossible for the automobile dealers and for the finance companies at the time of a sale of an automobile and the execution of a conditional sale contract by the purchaser thereof, to know the uses to which the automobile will actually be put. Such finance companies and dealers, however, uniformly provide in their contracts of conditional sale that in the event the automobile is used for the transportation or possession of liquor in violation of law, that the conditional vendor or his assignee (the finance company) may repossess the automobile, and all rights of the offending purchaser therein shall thereupon become forfeited (R. 10, 11, 20, 21, 66, 67). See also testimony (R. 32).

The usual investigation was made before the financing of the sale of the Ford Coupe by appellant to ascertain the moral and financial risk of the purchaser (R. 33). It is conceded that appellant is an innocent owner or lienor within the meaning of Section 26 of the National Prohibition Act, and if the proceedings to forfeit the said automobile had been brought under Section 26 of the National Prohibition Act, its interests would have been protected; whereas under Section 3450 its interests in the said Ford Coupe were forfeited, notwithstanding its innocence.

The Howard Motor Company, an automobile dealer at Seattle, Washington, on or about November 14, 1924, sold the said Ford Coupe to W. G. Campbell, under a conditional sale contract, under which title was reserved to the conditional vendor until all payments thereon were fully made. The Howard Motor Company on the same date, for valuable consideration, assigned the conditional sale contract to

appellant. At the time of the assignment of the conditional sale contract to appellant, there was due and owing upon it by said Campbell $607.19, and at the time of the seizure of said automobile by appellee, there was due and owing to appellant by said Campbell $101.18. Appellant intervened in the proceedings to forfeit said automobile as an innocent owner or lienor, and claimed protection according to Section 26 of the National Prohibition Act, and established evidence to conform with said Act (R. 31-35).

At the same time another proceeding with reference to a Gardner car was pending before the same District Court, and in which appellant had also intervened (R. 37-39). The decision of the District Court with reference to the Ford Coupe involved in this action and the Gardner car were rendered prior to the decisions of this court in *United States* v. *One Ford Coupe,* and *Port Gardner Investment Company* v. *United States.*

The decision and decrees of the District Court in reference to both the Gardner car and the Ford Coupe were taken before the Ninth Circuit Court of Appeals. The Ford Coupe involved in this case was there known as Case No. 4916, and the Gardner car as Case No. 4915. The Circuit Court reversed the District Court on the strength of the holding of this court in *Port Gardner Investment Company* v. *United States* with respect to the Gardner car (see *Commercial Credit Company* v. *United States* (C. C. A. 9), 17 Fed. (2d) 483); but affirmed the decision of the District Court with reference to the Ford Coupe involved in this action, 17 Fed. (2d) 902, and in its opinion the Circuit Court distinguished this case from the one involving the Gardner car as follows:

> "This case differs in only one respect from that bearing the same title and numbered 4915, decided

February 14, 1927 (17 Fed. (2d) 483), in that the driver of the seized automobile, although charged with both illegal possession of intoxicating liquor and transportation thereof, was prosecuted only for the offense first named, upon plea of guilty and conviction of which the government dismissed the other charge."

Counsel for the appellant and for the Government in the proceedings before the District Court stipulated as follows (R. 31):

> "Mr. Kennett: It is further stipulated as a part of the claimant's case between the counsel for the Government and myself that the man driving this car, W. G. Campbell, was charged under the National Prohibition Law in cause number 10223 of the records of this court with unlawful possession and transportation of liquor and plead guilty to unlawful possession, whereupon the Government dismissed as to the transportation, and that covers the identical transaction here involved.
>
> "Mr. Simon: It is so stipulated."

The evidence of the Government in this action was by testimony of Matthew Ryan, United States Custom Inspector, who testified as follows:

> "Q. Will you state to the Court the circumstances under which you made that seizure?
>
> A. Why, the coupe was reported to me as handling a lot of Canadian liquor, distributing it around town, and I had watched it a couple of times before I seized it make deliveries. It belonged to a man who lived up on Summit Avenue North about the 400 block. He used to park it in the alley back of his house and—so one evening I was coming by, I think it was the 9th of October.

Q. The 9th of October of last year?

A. Yes. And I decided to stop and catch him, so Inspector McTague was with me and we stopped there and he came out of the house and looked around and got into the coupe and started the motor and started to back out of the alley and I stopped him and told him I would like to search his car, told him who I was, and he says, 'All right,' so we opened up the back end of it and there was no liquor in there, we opened up the front door and the seat, there was only one seat in the car, the right-hand side was on a hinge and it was cut in the middle and just lifted up on a hinge, and there was thirteen quarts of liquor under the seat, so I arrested him and took him down to the immigration station and put the car in the appraisals warehouse.

Q. What kind of liquor was this?

A. I think there was three quarts of gin and ten quarts of whiskey.

Q. Did the bottles contain revenue stamps showing tax paid to the United States?

A. No, sir.

Q. You took the car into your possession at that time?

A. Yes, sir."

* * * * * *

"Cross-examination.

Q. Was that liquor fit for beverage purposes?

A. Yes, sir.

Q. And the largest container of any of them—they were all quart bottles, I understand?

A. All quart bottles, yes, sir."

* * * * * *

"The Court: What kind of liquor was it; local or——

The Witness: No, sir; there was three quarts of Old Pensioner Gin that were supposed to be the

produce of England, and six quarts of Perfection Scotch Whisky, and three quarts of Dunbar's Gold Label Scotch Whisky, and one quart of Cato's Gold Scotch Whisky.

The Court: What do you mean by Scotch Whisky?

A. That is what is said on the bottle.

The Court: Did it give any name of the maker?

The Witness: Yes, sir.

The Court: What were they?

The Witness: Well, this Dunbar's was supposed to be made in Scotland. It said on the bottle 'Produce of Scotland', and the same way with the Perfection. I don't remember the names of the makers, but the Prohibition Department has the evidence.

Q. Did you make any investigation to ascertain whether or not those were genuine liquors or whether they were moonshine and fake labels?

A. No, sir, I did not.

Q. You don't know, as a matter of fact, whether those liquors were manufactured and produced abroad, do you?

A. No, sir, on what it said on the bottle" (R. 24-28).

The only evidence as to the failure to pay taxes introduced by the Government was the testimony of W. M. Whitney, Deputy Collector of Internal Revenue. He testified that the tax had not been paid in his district, because there had been no taxes on liquor paid in that district within the last four years, but that he did not examine the records of any other district (R. 28-29).

ARGUMENT.

I.

Proceedings under Section 26 of the National Prohibition Act were mandatory.

The mandatory provisions of Section 26 of the National Prohibition Act were called to the attention of this court at the first argument and the reargument of *United States* v. *One Ford Coupe* and *Port Gardner Investment Company* v. *United States*. From the majority and dissenting opinions in *United States* v. *One Ford Coupe*, and the majority and concurring opinions in *Port Gardner Investment Company* v. *United States*, it is evident that the question of the statute being mandatory was fully and ably considered by this court. Since these decisions there has been very little if any contribution from the District or Circuit Courts that would be of any assistance in a further consideration of the mandatory features of that statute. For the convenience of the court we quote from the brief filed at the time of the original argument in the *Ford Coupe* and *Port Gardner Investment Company* cases by the same counsel now appearing for the appellant in this action.

"The provisions of that section are specific and mandatory, and require—

(a) That the officer upon seizing the intoxicating liquor transported or illegally possessed shall—
   1. Take possession of the automobile.
   2. Arrest the person in charge thereof.
   3. Proceed against the person arrested under the provisions of the National Prohibition Act.

(b) The court, upon conviction of the person, shall—
1. Order the liquor destroyed.
2. Order the public sale of the automobile, unless good cause to the contrary is shown by the owner thereof.

(c) The officer carrying out the execution of the court shall—
1. After deducting certain expenses provided for in the statute, pay all liens according to their priority, which shall be established by intervention or otherwise; and further that all liens against the property sold shall be transferred from the property to the proceeds of sale.

The re-enacting clause of Section 5 of the Supplemental Act provides:

> 'but if any act is a violation of any such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.'

Once a person is charged with a violation of the National Prohibition Act, or an officer finds the liquor being transported or possessed by a person in the automobile, the procedure against both the person and the vehicle must be under the provisions of the National Prohibition Act, and if the person is convicted under the provisions of that act, there is ipso facto a conviction or a forfeiture of the automobile insofar as the convicted law violator's interests are concerned.

In United States *v.* Torres, (Md.) 291 Fed. 138, the court says:

'The person and the vehicle were convicted at one and the same time under Section 26. The plea of guilty of Torres established the guilt of the car. In other words, there has already been, as respects the automobile, a conviction for the offense under the National Prohibition Act, and such conviction is a bar to prosecution under Revised Statutes 3450.'

See also—

The Spray (R. I.) 6 Fed. (2) 414.

United States *vs.* One Ford Automobile, Commercial Credit Company, Intervenor, District Court of Tennessee. Not yet reported.

It follows as a matter of logic that where the rights of innocent parties must be determined under the National Prohibition Act if the law violator has been convicted, equally must they be protected under the provisions of that act where the law violator has escaped or where he has been acquitted. As was said in the case of United States *v.* One Reo Truck (C. C. A. 2), (9 Fed. (2) 529):

'Now Revised Statutes Section 3450, at least as matter of logic, may still be in force as against the owner and mala fide lienors, but it cannot be in force against bona fide lienors when the offender has been convicted. That would result in a stark contradiction between the two statutes. Nor is it possible to say that it might be in force against bona fide lienors, when the offender is not convicted. The statute cannot mean different things at different times. If it does not cover such liens when the offender has been convicted, it does not cover them when he has not. It would be preposterous to say that the failure to convict an offender exposed the

> bona fide lienor to a penalty from which he would be exempt in case of conviction.'

This court, in the case of Coffey *vs.* United States, 116 U. S. 436, at page 443, has said:

> 'It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in The Palmyra, 12 Wheat., 1, 14. Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.*' "

The Ninth Circuit Court of Appeals distinguished this case involving the Ford Coupe from another case involving a Gardner car heard at the same time (*Commercial Credit Company* v. *United States*, 17 Fed. (2d) 483) and affirmed the District Court in this case (17 Fed. (2d) 902) because of the fact that the driver of the Ford Coupe was convicted of possessing intoxicating liquor in violation of the National Prohibition Act, instead of being convicted of transporting the liquor as in the case of the Gardner car. The charge against the driver of the Ford Coupe was for both transportation and possession in violation of the Prohibition Act (R. 31), but upon pleading guilty of the charge of

possession, the Government withdrew the charge of transportation and the Circuit Court says:

> "While the section (Section 26) in directing that the officer shall take possession of the vehicle makes use of the words 'transported or possessed', when referring to the liquor discovered in process of transportation, it is quite clear that the gravamen of the offense is the unlawful transportation, and that the disposition of the vehicle therein provided refers to this element of the transaction. The statute elsewhere (Section 3 of title 2 thereof) makes possession of intoxicating liquor an offense for which a punishment is provided by Section 29 of title 2. We do not think that Congress, having provided for the forfeiture of the offender's interest in the vehicle as a penalty for transportation, and a different punishment for unlawful possession of intoxicating liquor, intended to create a third offense, namely, possession in transportation, the penalty for which would include a forfeiture already incurred by reason of the act of transporting."

In Section 3, Title II, of the National Prohibition Act, is found the following:

> "No person shall * * * manufacture, sell, barter, *transport*, import, export, deliver, furnish or *possess* any intoxicating liquor * * *."

Section 29 of the same Act provides:

> "Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more

than $2,000, and be imprisoned not less than one month nor more than five years.

"Any person violating the provisions of any permit, or who makes any false record, report or affidavit required by this title, or violates any of the provisions of this title, for which offense a special punishment is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than 90 days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. * * * "

In Section 26 of the National Prohibition Act is found the following:

"Whenever intoxicating liquors *transported* or *possessed* illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

While the word "possess" appears in Section 3, to which the Circuit Court refers, so does the word "transport". The word "possess" appears in Section 26, but does not specifically appear in Section 29. Section 29 primarily has to do with punishment for manufacturing and selling liquor. Possession, if not for the purpose of manufacture or selling, would not be punishable under Section 29, except for the omnibus clause appearing therein, reading as follows:

"violates any of the provisions of this title, for which offense a specific penalty is not prescribed."

In *United States v. One Ford Coupe,* in the majority opinion of Mr. Justice Brandeis, it is said:

> "The case at bar does not present any conceivable question of cumulative remedies or of election. *While the second sentence in Section 26 uses the words 'transported or possessed', the context makes it very plain that the possession intended is possession in transportation.* Hence that section is applicable only if the person is discovered in the act of transporting intoxicating liquor in violation of law. There is no allegation in the libel that the automobile had been so discovered or was being so used. There is no allegation that Killian, who had possession of the automobile, has ever been prosecuted. It appears that a complaint was made but not that a warrant was issued, or that he was arrested or even that he was found. The motion to quash must be determined on the showing of the libel." (Italics ours.)

It is evident that Mr. Justice Brandeis did not intend to interpret the word "possess" in Section 26 as creating a different offense than the word "possess" in Section 3. It seems clear that Mr. Justice Brandeis meant that if the liquor was being transported, that the possession was possession incidental to the transportation and was merged therein. So that when a charge of possession and a charge of transportation is made against an offender under Section 3, Section 26 would still be applicable because the possession charged in Section 3 would mean the possession in transportation under Section 26, to which Mr. Justice Brandeis refers.

The Circuit Court of Appeals for the First Circuit takes this view of the interpretation of the words "possess" and

"transport" in Section 3, in *Brown* v. *United States* (C. C. A. 1) 16 Fed. (2d) 682. The defendant had been indicted on three counts, to wit, for transporting, possessing and importing liquor. The defendant moved that the Government should elect whether to submit a charge of transportation or a charge of possession, which was denied, and this was assigned as error. The Circuit Court said:

> "The testimony did not disclose any possession which was not incidental to transportation. While the boat had come to rest at her mooring at Raccoon Island, where she was pointed out to Brown by Hunt, the transportation had not ceased, but had been temporarily suspended, evidently awaiting directions from the defendant where the unloading should take place, and was to be resumed after these directions had been given.
>
> "The possession of the liquors was incidental to and involved in the act of transportation.
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> • • • • • •
>
> "The sentence imposed upon the defendant by the court was the payment of a fine of $500 and imprisonment for the term of four months. The verdict returned by the jury was not a general verdict of guilty, but a verdict of 'Guilty of all three counts'. The defendant was therefore found guilty under the first count and as there was, in our opinion, sufficient evidence to sustain this verdict and insufficient to sustain the third, while the second count, charging possession, was merged in the first, we have reached the conclusion that the judgment of the District Court should be reversed, and the case remanded to that court, in order that the defendant may be resentenced upon the verdict of guilty returned under the first count."

The Circuit Court of Appeals for the Second Circuit, in *Schroeder* v. *United States*, 7 Fed. (2d) 60, had occasion to consider the effect of the words "possession" and "transportation", and said, at page 65:

> "It is, however, assigned for error that the court erred in imposing sentence on both counts of the information. In this we concur, and think that what the court did amounted to imposing a double sentence for a single offense. The same facts proved unlawful possession and unlawful transportation. The only act of possession testified to was the possession necessarily involved in the transportation which was the subject of the second count. * * * The possession was necessary and incidental to the act of transportation. There may be, and commonly is, possession which is distinct from transportation.
>
> "Possession for a substantial time, and followed by transportation, might constitute two distinct offenses, just as possession for a substantial time, followed by a sale, might amount to two distinct offenses. But, where the only possession shown is that which is necessarily incidental to the transportation, the offense is single, and not double (Citations). And the law is settled that, where a person is tried and convicted of a crime which has various incidents included in it, he cannot thereafter be tried and punished for an offense consisting of one or more of such incidents. * * *
>
> "The conviction and sentence under the first count is set aside."

Unquestionably the possession of the intoxicating liquor in this case was incidental to the transportation. The liquor was discovered when the car transporting it was stopped by the officers. The liquor was possessed as an

incident to transportation, and it was the possession "in transportation" to which Mr. Justice Brandeis refers. It follows, therefore, that the mandatory features of Section 26 were applicable.

The Circuit Court of Appeals for the Second Circuit has held that under such circumstances Section 26 is mandatory, and is in direct conflict with Section 3450 R. S. That court said, in *Commercial Credit Corporation* v. *U. S.* (C. C. A. 2) 18 Fed. (2d) 927:

> "Lamonica and Calabresse were discovered in the act of transporting liquor in violation of law. Forthwith, under Section 26, it became the duty of the officer to seize the liquor, to take possession of the vehicle, to arrest the persons in charge thereof, to proceed at once against them 'under the provisions of this Title', and to hold the vehicle (unless the owner give bond), to abide the result of the trial of the persons arrested. * * * That duty has been violated if it be assumed that the Prohibition Administrator ceased on December 9, 1926, to hold the vehicle to await the outcome of the prosecution and thereafter held it under the provisions of Section 3450. In these circumstances, we believe there is a direct conflict between the two sections in question, and that Section 26 must control the disposition of the vehicle."

II.

The facts do not justify forfeiture under Section 3450.

According to the record in the case, the car was not smuggling liquor into the country, although the liquor found in the car bore labels to the effect that the liquor had been produced in Scotland and England. The liquor was in quart bottles.

Section 3289 of the Revised Statutes, Compiled Statutes Section 6030, provides:

> "All distilled spirits found in any cask or package containing *five gallons or more,* without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States."

Section 3320, as amended by Act of July 16, 1892, and as further amended by Act of Congress August 27, 1894 (Compiled Statutes Section 6102), is in part as follows:

> "Whenever any cask or package, containing *five gallons or more,* is filled for shipment, sale, or delivery on the premises of any rectifier who has paid the special tax required by law, it shall be inspected and gauged by a United States gauger whose duty it shall be to mark and brand the same and place thereon an engraved stamp, which shall state the date when affixed and the number of proof gallons. * * *"

Section 3323 Revised Statutes, as amended July 16, 1892, 27 Statutes 200, Compiled Statutes 6104, provides that:

> "Every package of distilled spirits containing *five wine gallons or more*, filled on the premises of a wholesale liquor dealer, who has paid the special tax required by law, shall be marked, branded, and stamped by such wholesale liquor dealer * * *."

The liquor in the instant case was not in containers of five gallons, but rather in quart bottles, and the law therefore presumes that the tax, at least the basic tax, on the liquor had been paid. The only tax that could be therefor considered would be the added tax or penalty of $4.20 for divergence of the liquor from non-beverage to beverage purposes, and there was no evidence in the record of that divergence, or at least of the divergence referred to in the statutes. In *Duke* v. *U. S.* (C. C. A. 4th), 275 Fed. 142, at p. 148, the court said:

> "Therefore when distilled spirits were found in a vessel of less capacity than five wine gallons, the law presumed that it was tax paid, and the burden was upon the party alleging the contrary to prove it, and in a criminal case to prove it to the satisfaction of a jury beyond a reasonable doubt."

and *Hester* v. *U. S.* (C. C. A. 4th), 284 Fed. 487, the court said:

> "In this case the spirits covered by the indictment consisted of less than five gallons, namely, a quart, and the defendant is entitled to the benefit of the presumption that the tax has been paid."

The gravamen of the offense under Section 3450 is the intent to defraud of the payment of a tax. If the tax on containers of less than five gallons is presumed to have been paid, it is difficult to understand how the intent to defraud

the Government of a tax can be presumed so as to warrant forfeiture under Section 3450. This point is raised to throw greater light upon the meaning of Section 3450, and not to make unnecessary refinements on that statute. Indeed, appellant would greatly regret if the decision in this case should be made only upon the fact that the containers were less than five gallons. A great many cases are now blocking the court calendars, involving confiscation of automobiles, and the instant case involves a very small sum, only $101. We frankly admit it is brought before this court for enlightenment as to what the rights of innocent parties are in the premises generally, and particularly as to the mandatory features of Section 26. Consideration of the point, however, is necessary because of the confusion in both the District Court and in the Circuit Court on the question of taxes, where both of these courts assume that the taxes were not paid because no taxes had been paid upon imported liquor within the district for a period of four years, and the quart bottles containing the liquor bore brands or labels representing it to be of foreign manufacture. The testimony, however, clearly establishes that the prohibition agent did not know whether or not the labels on the liquor were false; did not know whether the liquor was in fact of foreign make, and did not know whether the liquor had been imported in any district other than the district in which the examination had been made; that the agent did not know whether or not the liquor had been in a bonded warehouse prior to the adoption of the National Prohibition Act, and whether or not it might have been subsequently diverted from such a bonded warehouse.

If for the sake of argument, however, it should be said that the liquor was of foreign manufacture, and had been

smuggled into the country, nevertheless there would not have been sufficient ground for forfeiture of the automobile, because it would have been necessary to prove that the particular car in question had been employed in the smuggling of the liquor into the country.

In *National Bond and Investment Company* v. *United States* (C. C. A. 7), 8 Fed. (2d) 942, the court had under consideration the forfeiture of an automobile for alleged violation of the Customs Act, where it was shown that the liquor had been manufactured in Canada and had been brought into the country subsequent to the adoption of the National Prohibition Act, and that the customs duties had not been paid thereon. The court there said:

> "It does not appear from this that the coupe was used to bring liquor into the United States, nor is there any evidence on the question of intent. * * * Intent cannot be shown without showing intent of the user in the use of the car. There is nothing in the evidence from which the necessary intent can be inferred. Intent to defraud the United States out of customs duty may be inferred when a conveyance is used to smuggle goods into the United States, but to warrant such inference it must be established that the conveyance was so used."

There is no evidence in this case that the automobile in question was used in bringing the liquor into the United States. Furthermore, the libel was so framed as to charge violation of Section 3450 of the Revised Statutes, because the car was alleged to have been used to remove, conceal, and deposit the liquor with intent to defraud the United States of a tax thereon, and if the liquor be considered as of foreign manufacture, Section 3450 would not have been applicable.

The Circuit Court of Appeals for the Second Circuit in *The Squanto,* 13 Fed. (2d) 548, at 551, said:

> "The third cause of forfeiture cannot be sustained. It is based upon Section 3450 of the Revised Statutes, providing for forfeiture of any goods or commodities in respect whereof a tax is or shall be imposed, which is removed or concealed with intent to defraud the United States. The theory of the government is that the cases of intoxicating liquor were removed with intent to defraud the United States of the tax. The scope and reach of this section has no application to goods brought in from foreign ports, and we think refers only to articles produced within the exterior boundaries of the United States. The liquor on The Squanto was not produced within the United States but concededly without. Indeed, it was charged that it was imported into the United States. Its presence on board the Squanto could not form a basis of forfeiture for the alleged violation of this section."

III.

Forfeitures under Section 3450 R. S., instead of under Section 26 N. P. A., where transportation of liquors is involved, are against reason and justice.

A—Innocent parties suffer while guilty parties may escape.

> "A premium is put upon dilatory prosecution in order that forfeiture of the vehicle might be secured before conviction of the offending persons." (18 Fed. (2d) 927.)

B—The punishment of the guilty person is limited while the forfeiture of the rights of the innocent person is unlimited.

C—The relief granted to innocent parties under Section 5292 R. S. in effect at the time of the *Goldsmith-Grant* case has been repealed, and the only protection now existing to innocent parties is under Section 26 N. P. A.

A.

A confusion seems to exist among the various circuits as to the rights of innocent parties in cases similar to the case now under consideration, because of the decisions of the United States Supreme Court.

In *Goldsmith-Grant Company* v. *United States,* 254 U. S. 505, this court extended the forfeiture of the rights of innocent parties beyond that which had previously existed. The decisions of this court prior to that time had upheld forfeitures of the rights of innocent parties, where those parties knew the purpose for which the property was to be used or had acquired the property from the prior offender after the offense had occurred. In such cases the property was considered as taken by the innocent party subject to the encumbrances thereon by its prior wrongful use. In the *Goldsmith-Grant* case, however, the property was not acquired by the innocent parties subsequent to its wrongful use, but the property interests of the innocent parties were in the property at the time of its wrongful use, and the wrongful use was made of that property against the wishes and without the knowledge of the innocent parties.

This court recognized that the arguments in behalf of the innocent parties in the *Goldsmith-Grant* case were "formidable". It there said:

> "If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the accepted tests of human conduct. Its words taken literally forfeit property illicitly used though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that, if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation of the due process of law required by the Constitution."

At the time of the seizure of the automobile in the *Goldsmith-Grant* case, national prohibition was not effected. The case was therefore considered only as one in support and protection of the public revenue. The principle of law, however, established in the *Goldsmith-Grant* case has been further extended by this court in *Van Oster* v. *The State of Kansas,* 272 U. S. 465. In this latter case the court has held that the proceeding against the car, being one *in rem,* and the proceeding against the offending person, being one *in personam,* it followed that the forfeiture of the automobile, having preceded the acquittal of the individual, must be upheld. We have therefore the paradox in that case of the individual accused of transporting the liquor being found by a jury innocent of the charge, while the car in a prior proceeding *in rem* is found guilty of transporting the liquor. If, however, under the decisions of this court the individual charged with the offense had been acquitted prior to the forfeiture pro-

ceedings against the car, then in that case an acquittal of the individual in the proceedings *in personam* would have been *res adjudicata* to the proceedings *in rem* against the car, if the same person were the owner of the car.

This court, in *Coffey* v. *U. S.*, 116 U. S. 436, at page 443, said:

> "It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in The Palmyra, 12 Wheat., 1, 14. Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.*"

It would be against reason and justice to say that the acquittal of the individual prior to the forfeiture of the car would protect the rights of the individual charged with the crime in the car, but would not protect the rights of the innocent party in that car.

The United States Circuit Court of Appeals for the Second Circuit, in *United States* v. *One Reo Truck*, 9 Fed. (2) 529, has said:

> "Now Revised Statutes Section 3450, at least as matter of logic, may still be in force as against the owner and mala fide lienors, but it cannot be in force

as against bona fide lienors when the offender has been convicted. That would result in a stark contradiction between the two statutes. Nor is it possible to say that it might be in force against bona fide lienors, when the offender is not convicted. The statute cannot mean different things at different times. If it does not cover such liens when the offender has been convicted, it does not cover them when he has not. It would be preposterous to say that the failure to convict an offender exposed the bona fide lienor to a penalty from which he would be exempt in case of conviction."

It is furthermore held by this court in *Port Gardner Investment Company* v. *United States,* that a conviction of the individual charged with transportation in violation of the National Prohibition Act prior to the forfeiture of the automobile makes it mandatory to proceed against the automobile under Section 26 of the National Prohibition Act, thus protecting the rights of innocent parties.

It is established, therefore, from the decisions of this court, that a conviction of the alleged wrong doer for transportation of intoxicating liquor will afford the innocent parties having rights in an automobile protection under Section 26; that an acquittal of the alleged wrongdoer in a criminal proceeding against him will protect his property rights in an automobile in a subsequent proceeding *in rem,* but that his acquittal subsequent to the forfeiture proceedings against the automobile will not protect the rights of innocent parties in that automobile in a prior forfeiture proceeding. In other words, some of the circuits have felt bound by the decisions of this court to hold that notwithstanding a car is seized while transporting intoxicating liquor, nevertheless forfeiture proceedings under Section

3450 may be instituted and prosecuted with effect, if the forfeiture is accomplished before the acquittal or conviction of the individual.

The Fourth Circuit Court of Appeals, in *United States* v. *Commercial Credit Company*, 20 Fed. (2d) 519, had this situation before it. In that case the District Court had dismissed the libel against the automobile brought under Section 3450 and an appeal was taken by the government to the Circuit Court. While the appeal was pending in the Circuit Court, the alleged wrongdoer, who was arrested at the time of the seizure of the automobile, was convicted upon the charge of unlawful possession and transportation. After the arrest of the individual and the seizure of the automobile, the individuals were bound over to the court for violation of the Prohibition Act, but before an indictment had been found or an information had been filed against them, the United States attorney had filed a libel against the automobile under Section 3450. The fact that the information had not been filed or the indictment had not been found, although the persons had been arrested prior to the dismissal of the libel for forfeiture under Section 3450, caused the Fourth Circuit Court of Appeals to distinguish that case from the decision of the Second Circuit Court of Appeals in *Commercial Credit Company* v. *United States*, 18 Fed. (2d) 927. The Fourth Circuit therefore said that the question was whether or not the arrest and seizure and the issuance of a warrant, and the binding of the individuals over by the United States Commissioner to the court, was a sufficient election by the government to make it mandatory that the proceedings against the automobile must be under Section 26. The Fourth Circuit felt constrained, because of the decisions of this court in *United*

States v. *One Ford Coupe,* and *Port Gardner Investment Company* v. *United States,* to hold that the libel should not have been dismissed because the individuals had not at that time been convicted. Since, however, the individuals had been convicted prior to the decision on the appeal to the Circuit Court the dismissal of the libel was affirmed because the Circuit Court said it would have been useless to send the case back to the District Court, since under the *Port Gardner Investment Company* case, the conviction in the meantime of the individuals would make it mandatory to proceed under Section 26 against the car in what then would be a forfeiture subsequent to conviction.

The deduction, however, to be drawn from the decision of the Fourth Circuit is that if the car had actually been forfeited by the District Court, instead of the libel having been dismissed prior to the conviction of the individuals, then under the decisions of this court in *United States* v. *One Ford Coupe,* and *Van Oster* v. *The State of Kansas,* the forfeiture of the automobile would have had to have been upheld, notwithstanding that under the *Port Gardner Investment case* a conviction before the forfeiture would have made the forfeiture under Section 3450 invalid.

In the case at bar the individuals had been informed against both for transportation and for possession, and it was only upon a conviction of possession that the charge of transportation was withdrawn. The withdrawal of a charge amounts, in substance, to the acquittal of the individual for transportation, the possession, being only, as hereinbefore pointed out, incidental to transportation.

The fact that the government may, by delaying criminal proceedings against the individual, work an injustice to the innocent owners by the forfeiture of their rights in the

automobiles, has led the Circuit Court of Appeals for the Second Circuit, in *Commercial Credit Corporation* v. *United States,* to denounce the procedure, when it says:

> "It is settled that, after the conviction of such persons, forfeiture under Section 3450 is forbidden. To say it is permitted during the pendency of the prosecution and up to the moment of conviction would be most inequitable to innocent owners and lienors, and would put a premium upon dilatory prosecution in order that forfeiture of the vehicle might be secured before conviction of the offending persons."

The very fact that the Circuit Courts have been constrained to make this refinement in their interpretation of the law, because of the decisions of this court, warrant, we respectfully submit, a reconsideration by this court of the principles laid down in *Goldsmith-Grant Company* v. *United States* and the other cases involving the forfeiture of the rights of innocent parties. Certain it is that due regard should be given to the punishment and remedies provided in Section 26 of the National Prohibition Act, which have no relation to the ancient law of *deodand* but are based upon a modern conception of justice in that they carefully protect title and rights in property of all innocent persons, and provide for the forfeiture of the interests in the property of the guilty parties only.

B.

Furthermore, under the proceedings as now being followed by the government, the innocent suffer a greater punishment than do the guilty. A procedure under Section 3450 forfeits absolutely the rights of the innocent in the

automobile, notwithstanding the value of those rights, whereas the punishment of the individual under both Section 3450 and the National Prohibition Act limits the degree of punishment of the offending person. Under Section 3450 the individual, if prosecuted under that section, is limited to a fine or penalty of not more than $500. The section provides:

> "And every person who removes, deposits or conceals, or is concerned in removing, depositing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed with intent to defraud the United States of such tax or any part thereof shall be liable to a fine or penalty of not more than $500."

Section 29 N. P. A. provides that a person who manufactures or sells liquor shall for the first offense be fined not more than $1,000 or imprisoned for not more than six months; and for violation of any other provisions for which a specific penalty is not prescribed, a first offender shall be fined not more than $500. We might therefore very well have a case, as has happened in District Courts, where the interest of the innocent party in the automobile would be in excess of $1,000. The guilty first offender in that case would be fined under either Section 3450 R. S. or Section 29 N. P. A. not more than $500, while the innocent owner of property interests in the automobile would suffer the full forfeiture of his interests, which would be in excess of $1,000.

As an illustration, counsel for the appellant has had a case where an innocent lienor had an interest of $1,800 in an automobile, which would have been absolutely forfeited

under Section 3450, but for violation of the National Prohibition Act the offender had to pay only a nominal fine.

Any procedure or any state of law which countenances, let alone directs, a greater punishment upon the innocent than upon the guilty for the same offense is against reason and justice, and should not be countenanced by our courts.

C.

At the time of the decision of this court in *Goldsmith-Grant Company* v. *United States,* innocent parties were not entirely precluded from some relief where forfeitures were made, because under Section 5292 of the Revised Statutes they could, in proper cases, make application to the Secretary of the Treasury for the return of the forfeiture. The relief granted, however, by Section 5292 has now been taken from the innocent owners, because by Act of Congress, September 21, 1922, Chapter 356, Title IV, Section 642, 42 Statutes 989, repealing Section 5292 and like statutes. The only protection now afforded to innocent owners is that under Section 26 of the National Prohibition Act.

While the relief under Section 5292 was not discussed in the *Goldsmith-Grant* case by this court, it may well have been in mind, and the circumstances that that relief is now taken from the innocent owners and his only relief is in Section 26 of the National Prohibition Act, might well influence this court in holding that forfeitures, so far as

innocent owners are concerned, must be brought within the provisions of Section 26.

It is submitted that the decree of the United States Circuit Court for the Ninth Circuit should be reversed.

Respectfully,

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